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IN THE
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1095

MARION G. DENTON,
Petitioner,

v.

THE UNITED STATES,
Respondent.

MEMORANDUM IN REPLY TO MEMORANDUM IN OPPOSITION

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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The Government's Memorandum in Opposition would create the mistaken impression that the petitioner has received adequate compensation by reason of the payment of a portion of the money he would have received had it not been for the fundamental "nature of the defect", and the extreme "gravity of the harm from which relief is sought", in terms of the recent opinion of the Court in

Schlesinger v. Councilman, No. 73-662, decided March 25, 1975, slip op., p. 14, where the Court affirmed the authority of civilian courts to consider collateral attacks on court-martial decisions.

So serious was the error in this case as to justify an investigation and report of a Congressional committee during the pendancy of the review proceedings – the only time in history that this has been done. For the Court's reference, a copy of the report of the Special Committee of the House Committee on Military Affairs is appended hereto as Appendix A.

Petitioner is not seeking largesse. In fact, the amount he has received to date has been more than consumed in the cost of his efforts to obtain justice in the sense of recovering what he would have received had he merely been treated like any other officer. A cursory reading of the Government's Memorandum might indicate that petitioner was made a Brigadier General, but this is not so. What he sought principally in 1965 in his application to the Correction Board was the implementation of the Board's 1964 decision setting aside his discharge and granting him restoration of all rights, privileges and property of which he was deprived". He did seek the correction of the release date utilized by the Board, but this could only have been known in 1964 when the Board in its decision first utilized that date. Thus petitioner did not sleep on his rights in this respect. It is worthy of note that he was not made a brigadier General, as a cursory reading of the Government's Memorandum might indicate. This though the vicissitudes encountered during solitary confinement – struggles encountered in being with the diversion of funds far in excess of that cited as being made available by the Government to the petitioner. All from

that day when petitioner heard the ringing sound "Guilty" during his mission of making trees taller and grass greener.

The Government admits in its statement of the case that petitioner's 1965 application sought only the "amendment" of the Correction Board's earlier decision. Actually it was filed at the suggestion of the Vice President of the United States, and was treated by the Board itself as a "reconsideration" of its earlier decision.

The Government refers to petitioner's conviction for failure to carry out a "lawful" order of a superior officer, but does not go further to point out that the "lawful" order was that of an Army colonel in direct conflict with an order of the President of the United States directing petitioner to take over the command of that same colonel.

The Government also refers to the "general demobilization following World War II" as establishing the reasonableness of the date given by the Board to petitioner's release from active duty. However, that date, September 2, 1945, was "V-J Day", when our troops were deployed throughout the Pacific Theater at full wartime strength, and had not even begun the actual physical process of demobilization. It is doubtful if any serviceman was separated on that date.

No mention is made in the government's memorandum of the causes of action of the petitioner independent of the authority of the Correction Board, and in particular, of the statutes granting retroactive pay following the restoration of military commissions. The Government also fails to consider the question raised by petitioner as to the representations made by the Government as to the applicability of limitations, as per the copies of communications appended to the petition. The effect of these was to confuse and mislead the petitioner, and raises the question of

clean hands in the Government's treatment of him. The Federal issues in this case are substantial and important, and they merit the Court's consideration.

Respectfully submitted,

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APPENDIX

Re: Major Marion G. Denton

COURT MARTIAL OF MAJOR MARION G. DENTON

Marion G. Denton, Major, Air Corps, Serial No. 0-150432, a cadet in World War I, receiving his primary training at Park Field, Millington, Tennessee, and having an aeronautical rating of Reserve Military Aviator, was ordered to duty by S.O. - 176, paragraph 124, of the War Department. An extract of that order follows:

"EXTRACT

* * *

124. Par. 98, S.O., 166, W.D., 1941, is revoked. By direction of the President under the authority contained in Public Resolution No. 96, 76th Congress, approved 27 August, 1940, Major MARION GRAY DENTON (0-150432), Air Corps Reserve, is ordered to active duty, effective 1 August, 1941. On that date he will proceed from Auburndale, Florida, to Maxwell Field, Montgomery, Alabama, reporting to the commanding officer, Air Corps Advanced Flying School, for duty. Major DENTON will rank from 1 August, 1941. He will be relieved from duty in time to enable him to arrive at his home on 31 July, 1942, on which date he will revert to inactive status. The travel directed is necessary in the military service. FD 1499 P1-06 A 0410-2 and 3 and QM 1601 P61-07 A 0525-2 and 3. The duties to be performed by this officer will not require him to participate in regular and frequent aerial flights.

* * *

BY ORDER OF THE SECRETARY OF WAR:

G.C. MARSHALL
Chief of Staff

OFFICIAL:
E.S. Adams
Major General
The Adjutant General

A TRUE COPY
/s/ George P. Keenan
GEORGE P. KEENAN,
W/O (jg) AUS
Asst. Technical Inspector."

It will be noted that the final sentence of that order reads: "The duties to be performed by this officer will not require him to participate in regular and frequent aerial flights."

It is noted that upon his reporting to duty he made several efforts to have his flying status restored; that in the latter part of 1942 he complied with Army Air Forces Regulation 50-3 and purchased some flying time "outside"; that due to a change in Regulation 50-3 he bought some "high-powered" flying time and in April 1943 a Board of Officers was convened and he qualified through a flying test with a rating of Pilot. His statement that he qualified for the aeronautical rating of Pilot is based upon the fact that he was told by the Board that he had met the qualifications and saw the approval of the Board as evidenced by the Board proceedings which were returned to Southeast Army Air Forces Training Center for correction. He has not had official notice of this qualification. Major Denton attended the Technical Inspectors School at Chanute Field. This background is given for the purpose of determining whether or not as of June 18, 1943, he was a flying officer and eligible to command Air Forces units in compliance with Army Regulation 95-60.

While he was at Chanute Field he received a letter from his Post Adjutant, stating that a telegram had been received advising that he was to be detailed as Post Commander in an active theater. This letter bore the approximate date of May 28, 1943, and was from Headquarters, Buckingham Army Air Field, which was his home station at that particular time. The letter enclosed a telegram from Southeast Army Air Forces Training Center, stating he was to be detailed as Post Commander in an active theater. That telegram and letter were presented as exhibits C and D in his

trial but were not even considered as bearing upon his defense at trial, to the effect that his order S.O. - 156 specifically ordered him to be assigned as Post Commander of the Greenland Base Command. . . . "upon arrival at destination he will assume command." It was at Maxwell Field that he first learned that he was assigned as Post Commander of an active threater, Greenland Base Command. Order 156, extract of which is set forth herewith, directed Major Denton to proceed to Presque Isle and to report to the commanding officer of the North Atlantic Wing for transportation to destination, which he did, arriving at Presque Isle on June 16, 1943.

"S E C R E T

HEADQUARTERS
ARMY AIR FORCES SOUTHEAST TRAINING CENTER
Maxwell Field, Alabama

SPECIAL ORDERS) June 8, 1943
No. 156) EXTRACT S E C R E T
Auth: Hq AAFSETC
Initials ?
Date: 8 June 1943

* * *

3. MAJ. MARION G. DENTON 0150432 AC is reld fr asgmt to BAAF Fort Myers, Fla. and by direction of the President is asgd as Post Commander of the Greenland Base Command. He WP fr BAAF Fort Myers, Fla. to Presque Isle, Maine, reporting to the CO North Atlantic Wing Air Transport Command not later than June 15, 1943, for T by air to destination. Upon arrival at destination he will assume command.

* * *

By command of Brigadier General WELSH,

D.D. FITZGERALD,
Colonel, G. S. C.
Chief of Staff

OFFICIAL:
/s/ JAMES W. PORTER
JAMES W. PORTER
Lt. Col., A.G.D.,
Asst. Adj. General

S E C R E T."

Upon arrival he presented to the Adjutant of the North Atlantic Wing a copy of his secret orders; the Adjutant could not determine exactly where he was to go and remarked, "There are several installations in Greenland and I do not know where to take you." Major Denton replied, "All I have is the order itself." The Adjutant then told him to go to officers' quarters and that he would hear from him. On June 17, 1943, the Adjutant sent for him and informed him that information had been received from the War Department as to the proper destination and proceeded to issue a trip ticket to BW-1. BW-1 is also designated as APO 858, c/o Postmaster, New York, New York. Acting upon the information of the said Adjutant that he was being sent to the proper destination, Major Denton boarded a plane on the afternoon of June 17, 1943, and was taken to the Greenland Base Command designated as APO 858, arriving there in the early hours of the morning of June 18, 1943. Later that morning he directed the Officer of the Day to take him to Post Headquarters and was conducted to the Post Headquarters and introduced to a Major Lloyd. He told Major Lloyd, "I have come here to

assume command of the post" and started to take from a manila envelope a copy of S.O. - 156, which we have discussed. Major Lloyd, without seeing a copy of said order, said "Let's go see the Colonel." This action of Major Lloyd's led Major Denton to believe and assume that Col. Robert W.C. Wimsatt was the post commander. He was conducted into the Adjutant's office, introduced to Captain (now Major) Anderson, and waited approximately 30 minutes while the Adjutant went to another office. The Adjutant then returned and asked for a copy of Major Denton's orders. Taking the copy of the orders, the Adjutant disappeared again. When he returned, Major Denton was taken in and introduced to Colonel Wimsatt. Upon looking at the copy of the order, Colonel Wimsatt remarked, "That's a crazy-looking order, it looks like an Air Corps order." In the course of their conversation, Colonel Wimsatt said, "There is no such thing as Post Commander of the Greenland Base Command." Present at this conference was Colonel Wimsatt, a Col. Kelsey Reeves, a Capt. Thomas L. Anderson, and Major Lloyd. Whereupon Major Denton told Colonel Wimsatt that it might be a crazy order but that he did not write it, he was there merely to comply with it. Colonel Wimsatt did not inquire into any qualifications, credentials, personal history, or reasons for the presence of Major Denton, and it is presumed that all of this had been talked over in the 30 minutes that Major Denton was kept waiting for the interview. Colonel Wimsatt finally told Major Denton to return to his quarters and that he would hear from him.

The foregoing is substantiated by testimony at the trial, in which Colonel Wimsatt testified that Major Denton did not formally report to him, that it was in the form of a visit. That statement was correct because Major Denton was really appearing for the purpose of taking over command.

June 18, 1943, was Friday.

Colonel Wimsatt made no further contact with Major Denton. The next day, which was Saturday, Major Denton wrote a letter direct to the Air Inspector, Army Air Forces, Washington, D.C., attention Technical Division, explaining the predicament in which he found himself and in paragraph 2 he stated: "At present no duties have been assigned or assumed, due to the evident conflict of orders with organization and the presence of the undersigned is not immediately needed at the above APO." Also, in paragraph 4 of same letter: "Transports of the ATC fly between this Post and Washington, and it is thought that a trip by such means would result in several very helpful clarifications." Major Denton received an endorsement reply to the foregoing letter under date of June 29; however, orders were not issued by Washington to enable him to carry out the suggestion.

Having heard nothing from Colonel Wimsatt, early on Monday morning of June 21, 1943, Major Denton attempted to confer with him and was informed that he was not in his office; then, in the early afternoon of the same day, Major Denton again called at the office of Colonel Wimsatt and succeeded in getting an audience with him. He stated to the Colonel that he had been ordered by the War Department to that particular destination to perform a certain duty and had been unable to perform that duty, and thought it advisable for him to notify the War Department in Washington, to which Colonel Wimsatt replied that it was not necessary, stating, "This is where you belong." Evidence obtained shows that this statement was in conformity with Major Denton's ideas, as he firmly believed that he belonged right there and that he was to assume command as post commander under his S.O. - 156. It is also evident that, regardless of what Colonel Wimsatt knew and/or

believed, he did nothing to help Major Denton clarify this situation either by advice or command.

This Committee has before it facts to show that while Colonel Wimsatt attempted to justify his actions by saying he knew Major Denton was coming to the base and why he was coming, and that his knowledge was based upon information received by him from the War Department, both mail and radio, copies of which were in his files at the base headquarters; yet he did not at any time, even upon request, produce such written evidence to support his statement. Also, his statement was refuted by his Adjutant, Captain Anderson, who stated there were no other orders at the base, just the S.O. - 156. When asked before the investigating officer whether he relied upon this order for his authority to issue commands to Major Denton, Colonel Wimsatt replied, "Not specifically, we have War Department order on your being transferred here." From the position that Colonel Wimsatt took later, this statement is incorrect and a variance. Responses to inquiries made by this Committee to the War Department were to the effect that no orders concerning Major Denton could be found.

Four days passed during which time Major Denton, receiving no instructions or advice from Colonel Wimsatt, remained in transient quarters.

Out of a clear sky, on June 23, 1943, without advance instructions, conference, advice, or information of any sort, Colonel Wimsatt's billeting officer, Lt. Frank Zitnik, appeared at the transient officers' mess, where Major Denton was eating his noonday meal, and informed him that he, Lieutenant Zitnik, was relaying a message from Major Anderson to the effect that a plane was going to leave in about twenty minutes; that "they" would like to have him on it

and for him to call the Priorities and Passenger Officer. As Major Denton was leaving the mess hall, he met the Assistant Adjutant, who said that "they" had been looking for him for fifteen minutes. Major Denton replied that he did not know what it was all about and that he expected to see the Colonel before he went anywhere. Major Denton then proceeded to his quarters and in a few minutes the Colonel and his Adjutant came in. The following conversation ensued:

> Colonel: Major, I want you to get on the airplane waiting for you and go to No. 2.
>
> Major: I understood, Colonel, that we were to have a conversation before I was sent anywhere.
>
> Colonel: I have a sick commander and want you to go and take over at No. 2.
>
> Denton: In that case I request that you report me as unfitted for duty.
>
> Colonel: I am not going to argue with you – you are going on that plane or I am going to try you.
>
> Major: Then, sir, I suggest that you try me.
>
> Colonel: Prepare the charges, then, Captain."

Colonel Wimsatt and his adjutant then left the building.

It is difficult for the Committee to understand how a commanding officer, assuming he was such and a superior officer, could send a new officer to any assignment without assuring himself that the new officer had, and fully understood, complete instructions as to the duties to be performed and the exact location of the place of assignment. It should be borne in mind that Colonel Wimsatt was fully

aware that this officer had not been in the Arctic before and did not know what conditions he was facing, nor whether he was being sent to a flying field, a weather bureau, or a radio station.

The evidence presented to the Committee shows that later that day, June 23, 1943, Major Denton was placed under arrest and confined to his quarters, having access only to the transient mess and the latrine, which were in adjacent buildings.

On June 24, 1943, at 10:45 a.m., Major Denton had delivered to him a copy of the following order:

"HEADQUARTERS BASE COMMAND
APO 858, c/o Postmaster
New York, N.Y.

SPECIAL ORDERS) 23 June 1943
:
NUMBER 111)

1. Major MARION G. DENTON, 0150432, Air Corps, having reported for duty with this Command 18 June 1943 pursuant to Paragraph 3, classified Special Orders 156, Headquarters Army Air Forces Southeast Training Center, Maxwell Field, Alabama, dated 8 June 1943, is hereby relieved from attached to Headquarters and Headquarters Company Base Command, APO 858, c/o Postmaster, New York, N.Y., and assigned to Army Base, APO 679, c/o Postmaster, New York, N.Y., and will proceed thereto by first available air transportation. Upon arrival Major Denton will assume command of Army Base, APO 679, c/o Postmaster, New York, N.Y., relieving the present commanding officer Major CARL G. JENSEN, 0306039, Infantry.

Transfer of funds and property, etc. will be accomplished according to appropriate Army Regulations.

* * *

By order of Colonel WIMSATT:

THOMAS L. ANDERSON
Captain, Infantry
Adjutant

OFFICIAL:

/s/ THOMAS L. ANDERSON
Thomas L. Anderson
Captain, Infantry
Adjutant"

HEADQUARTERS BASE COMMAND
APO 858, c/o Postmaster
New York, N.Y.

23 June 1943

SPECIAL ORDERS)
:
NUMBER 111)

1. Extracted.

2. Major CARL C. JENSEN, 0306039, INF, is reld dy and assignment Army Base, APO 679 NYC, and assigned to Army Base, APO 858, NYC. He WP thereto by first available T. reporting upon arrival to the CO thereof, to assume command of the 73rd Inf Bn (Sep).

3. VOCO of 19 June 1943 attaching Major MARION G. DENTON, 0150432, AC, to Base Hq & Eq Co, APO 858 NYC, for administration is hereby confirmed and made of record.

By order of Colonel WIMSATT

THOMAS L. ANDERSON
Captain, Infantry
Adjutant

OFFICIAL:
/s/ THOMAS L. ANDERSON
Thomas L. Anderson
Captain, Infantry
Adjutant"

The fact that the above order was published after the arrest of Major Denton and not prior to the foregoing oral order, would not have been important or irregular, in the interest of time, had Colonel Wimsatt, or his properly designated officer, taken up the matter of assignment and duties to be performed and had informed Major Denton that an order covering the discussed assignment would follow him.

However, in complete absence of any advance instructions or discussion relative to the assignment in question, and believing his orders to be definitely contrary to such action, Major Denton's case presents a very unusual situation. It is understandable that if combat conditions actually existed, or there was danger of its taking place, there might be occasion for a commanding officer to disregard the formalities which were certainly due in this instance; but such conditions did not exist.

A close examination of the conversation alleged to be a legal order given by Colonel Wimsatt to Major Denton, knowing that based upon that conversation charges were preferred, would lead a thinking man to wonder if he were being "shanghaied." It must be remembered that six days had passed and Colonel Wimsatt had not attached Major Denton

to any organization, had not advised or informed him as to what his duties were or were to be, but had requested him to remain in transient quarters and eat at transient mess, the same as any visiting officer.

The Committee has before it the fact that on July 10, 1943, Colonel Wimsatt was relieved of his command at Greenland Base Command on orders instituted in Washington as of June 24, 1943, the next day after the alleged violation by Major Denton.

Colonel Albert D. Smith, now a Brigadier General, relieved Colonel Wimsatt, and took over command of Greenland Base Command on July 10, 1943, and immediately went on a mission to Iceland, returning to his command on July 28, 1943. During all of that interval, from June 23, 1943, to July 28, 1943, Major Denton had remained in highly restricted confinement. Then on July 28, 1943, Colonel Smith called Major Denton to his office and lifted the confinement. In his conversation with Major Denton, Colonel Smith invited a full explanation of his position, saying that he had heard of Major Denton's case while in Washington, prior to coming to Greenland, and wanted to help any one in trouble; that Major Denton was not a criminal and he was not going to treat him as one; that when he, Denton, went out of the door of that office, he could do anything that any other officer of the base could do; that Major Denton would stop eating in the transient officers' mess, and would eat with the permanent officers; that Colonel Wimsatt was trying to protect Major Lloyd; that he, Colonel Smith, was in hopes that Washington would send the charges back for another investigation and recommendation, and, in that case, it would be disposed of. Colonel Smith exhibited to Major Denton a letter he had received from Maxwell Field, stating Major Denton's

S.O. - 156 had been amended, assigning him to the Greenland Base Command. Major Denton did not receive a copy of the amendment, but was shown same at Mitchel Field on August 20, 1943, the day of the second investigation, at which time Major Denton asked for and was furnished with a typewritten copy. The Amended Order reads as follows:

"WAR DEPARTMENT
THE ADJUTANT GENERAL'S OFFICE
WASHINGTON, D.C. JHD/egw/1515-MU

AG 201-Denton, Marion G.
(6-2-43) PO-A.

8 July, 1943

Subject: Amendment of Orders.

Thru: Commanding General,
Southeast Air Force Training Center
Maxwell Field, Alabama.

To: Major Marion G. Denton, 0-1580432, Air Corps.

1. The Secretary of War amends paragraph one (1) of classified letter orders AG 201-Denton, Marion G. (6-2-43) PO-A, 5 June 1943, pertaining to Major Marion G. Denton, to read as follows: It is desired that you issue the necessary orders to relieve Major Marion G. Denton, 0-150432, Air Corps, from his present assignment and duty, effective at such time as will enable him to comply with this order, and assign him to the Greenland Base Command. He will proceed from his present station to Presque Isle, Maine, and report to the Commanding Officer, North Atlantic Wing, Air Transport Command, not later than 15 June 1943, for transportation by air to destination. Upon arrival

at destination he will report to the Base Commander for duty.

/s/ BEN D. CULLETON
Ben D. Culleton
Adjutant General.

Distribution:

Commanding General, Army Air Force.
Army Postal Service, Room 3-e-561, The Pentagon

A TRUE COPY
/s/ W. STONE
W. Stone
Major, A.G.D.
Asst. Adj. General."

If the original order of June 8, 1943, pursuant to which Major Denton proceeded to Greenland, was clear as to its proper interpretation, there was no need to issue corrective orders dated July 8, 1943, and in that very correction it creates in the opinion of the Committee, a doubt on the part of the War Department itself as to the meaning of the orders of June 8, 1943. It is, furthermore, firmly the opinion of the Committee that where such a doubt existed as to the proper meaning and interpretation of orders as to cause the War Department to correct them, as was done, the situation thereby corrected is certainly not one to result in the sentecning of an officer with a past record such as Major Denton had, to twelve years at hard labor, nor in fact to even subject him to trial by court martial. The Committee notes that as late as July 8, 1943, the War Department in Washington recognized the fact that they had not assigned Major Denton to the Greenland Base Command, as is shown by the foregoing amended orders addressed to

Major Marion G. Denton *through* Commanding General, SEAFTC, Maxwell Field, Alabama, and not through the commanding general of Greenland Base Command. Therefore, the commanding officer (either Colonel Wimsatt or his successor) could not have assigned him to the Greenland Base Command without proper authority from the War Department, and, likewise, neither of them could possibly have been his superior officer on June 23, 1943, for the purpose of giving him orders of duty. The amendment negates the charge of violation of the 64th Article of War.

Major Denton left Greenland on August 17, 1943, on orders to report to Mitchel Field for temporary duty. On August 20, 1943, he was ordered to appear before an investigating officer for a second investigation. Colonel Wimsatt did not appear before this investigating officer, but his statement of expected testimony was introduced. It could be reasoned that the Commanding General of the First Air Corps did not adopt the report previously made in Greenland but instead ordered a new investigation upon which a recommendation for a court martial trial could be successfully based. In this second investigation Colonel Wimsatt was conspicuous by his absence, although readily available. This is borne out by a portion of the record of trial. Defense moved to quash the charge upon the ground that the charges and specifications were not given a fair and impartial investigation, that the investigating officer exceeded his authority in that he acted as judge and jury to determine the legality of the order involved, and that the accused was not given the opportunity to examine all of the documents alleged to be in the accuser's possession. It is believed that Major Edward A. Borsage exceeded his authority in assuming to examine all documents and determining whether they were legal without disclosing their contents to the accused or producing them. In denying

the motion to quash, the court had before it the statement of the prosecution in objection to the motion, to wit:

> "Prosecution: The accuser, Colonel Wimsatt, was present and was called to testify before the investigation officer. At the investigation by Colonel Sparks at Mitchel Field, the accuser, Colonel Wimsatt, was not available. *At that time Colonel Wimsatt was in Arkansas. He had not yet been called for the trial - the other witnesses had. . . .*" (Emphasis supplied.)

According to the prosecution's statement, it had been determined before the second investigation was conducted, that there was to be a trial. Therefore, his investigation report must meet that requisite, and it is manifest that he had to keep out of his report any possibility of the question of legality arising, by making the accuser "not available." Can it be that this complies with the 70th Article of War requiring that an investigation shall be thorough and impartial? If it is not the province of the court to determine whether or not the investigation was or was not thorough and impartial, but a matter for the reviewing authority, how was the reviewing authority to be able to determine the legality of the first investigation when it was discarded, thereby reaching the inevitable conclusion that its disclosure would prove there was no violation?

At the trial, Major Denton could not get the defense counsel of his choice, and the reason given was that he was not *available*, although Major Denton had asked for him immediately after his arrival at Mitchel Field, August 18, 1943, and the trial was held on September 27, 1943. Two officers unknown to the accused were appointed defense counsel, and in contrast with the members of the prosecution, the defense counsel had little experience with serious charges, neither one being a member of the Judge

Advocate General's Office. A Colonel Gersten, who has the reputation of being an outstanding defense counsel, was designated law member of the court as originally constituted. Late Saturday afternoon before the trial was to begin on Monday morning, Colonel Gersten was relieved as law member, and a Colonel Fisher, who was a member of the Judge Advocate General's Office, and who had an office in a temporary building adjoining that of the Trial Judge Advocate, was appointed. The same order named a member of the Judge Advocate General's Office from Washington as Trial Judge Advocate, while the original Trial Judge Advocate was named as assistant.

To sustain the charge, it would have neen compulsory to have the testimony of the officer in the Adjutant General's Office, in Washington, who gave the directive to SEAFTC to issue order to Major Denton, Lt. Col. J.H. Dailey. That officer was responsible for the issuance of this order, and he knew what it directed to be obeyed. His testimony would have shown whether or not he intended to assign Major Denton to be post commander of Greenland Base Command and to assume that command upon arrival there. This officer is now and was then Chief of the Overseas Assignment Section of the Adjutant General's Office and upon inquiry from him for the Committee he stated that the Army Air Forces requested that Major Denton be assigned as Post Commander of the Greenland Base Command; that before those orders were actually prepared he received a telephone message from the Air Forces to the effect that they "had better make it by direction of the President because an officer on the Post ranked him," and that it was for this reason that they put in that it was by order of the President; that "otherwise, if he would have reported to the Post to which he was assigned the

other chap who ranked him would still have been the Post Commander, not Denton."

This should entirely eliminate any doubt as to what was intended in issuing the order of June 5, 1943, to Maxwell Field which was the basis of the orders of June 8, 1943, to Denton, but in addition to this those orders were not clear or definite even to such extent. Furthermore, there is no question but that full authority is definitely found in existing law for the President to issue such orders in the event of his determining that they are indicated as stated in the Federal Code Annotated:

> "1591. Rank and precedence among Regulars, Militia, and Volunteers (article 119). – In time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. (June 4, 1920, c. 227, sub-chapter II, & 1, 41 Stat. 811.)"

There was clearly confusion in the issuing of said order, as was shown in a letter from the Air Adjutant to Colonel Philip Doddridge, Maxwell Field, Alabama, dated July 6, 1943, in answer to a letter dated June 30, 1943, from Colonel Philip Doddridge, and the amendment. These two letters are quoted below:

"Secret

HEADQUARTERS
ARMY AIR FORCES SOUTHEAST TRAINING CENTER
Maxwell Field, Alabama

30 June 1943.

Colonel Fred C. Milner, A. G. D.,
Air Adjutant General,
Headquarters, Army Air Forces,
The Pentagon,
Washington, D.C.

Dear Colonel Milner:

"I am submitting to you a situation that has arisen in Greenland and which has come to our attention through personal corresponsence.

"Pursuant to a secret letter, The Adjutant General, dated 5 June 1943, file AG 201-Denton, Marion G. (6-2-43) PO-A, this headquarters issued paragraph 3, Special Orders No. 156, 8 June 1943, which reads in part as follows:

'Major Marion G. Denton, 0150432, Air Corps *** by direction of the President is assigned as Post Commander of the Greenland Base Command. He will proceed ***. Upon arrival at destination he will assume command.'

"You will note that the wording in the letter of The Adjutant General, cited above, is identical to the wording we use in our Special Orders.

"Attached is a copy of a letter written by Major Denton to an officer in the Judge Advocate's office of this headquarters, which indicates either a serious situation existing

in Greenland or very definitely a misunderstanding as to Major Denton's status.

"I pass this on to you for any action that you may deem desirable and appropriate, and would very much appreciate advice from you as to what action you may decide to take.

"With kindest personal regards,

Sincerely,

/s/ PHILIP DODDRIDGE
Philip Doddridge
Colonel, A. G. D.,
Adjutant General

SECRET"

"SECRET

6 July 1943.

Colonel Philip Doddridge,
AAFSE Training Center,
Maxwell Field, Alabama

Dear Colonel Doddridge:

"I had the matter of Major Denton's assignment looked up in our Personnel Division. They have just informed me that they have asked The Adjutant General to amend the order to delete so much as reads 'and by direction of the President assign him as Base Commander of the ***Base Command' and to substitute therefor, 'assign him to the

***Base Command' and to direct him upon arrival at destination to report to the 'Base Commander' instead of 'assume command'.

"I do not know if the original order was a mistake or not. It has apparently caused considerable difficulty and I hope that the change mentioned above will straighten out matters without further trouble. If I can be further service, let me know.

Sincerely yours,

FRED C. MILNER,
Colonel, A.G.D.,
Air Adjutant General

SECRET"

Major Denton attempted to carry out the duty assigned in S.O. -156 and in so doing he was clearly justified by the foregoing facts. If there was a violation of Colonel Wimsatt's order in defiance of S.O. - 156, it was not chargeable to Major Denton, but to the Adjutant General's Office in Washington. When Colonel Carey testified that Major Denton had been sent to relieve Colonel Wimsatt, the Trial Judge Advocate said, "That in itself is ridiculous, not even the President can do that." This is contradicted by existing law as quoted above.

Colonel Malcolm Stewart, a Regular Army officer of thirty years experience, whose assignment was Air Inspector of the First Air Force and whose duty was to see that all orders were properly carried out, was not allowed to testify for the defense as to what was Major Denton's duty under that order, because they said he was not an expert.

Colonel Raynor Garey, AGD, Adjutant General, First Air Force, was called as a witness for the defense. His testimony, in part, follows:

Q. But due to your experience you were taken in here as Adjutant General and sent up here as an experienced man to assist in the proper writing of orders for the First Air Force?

A. That is my duty as Adjutant General of the First Air Force.

Q. I hand you an order which is marked "Exhibit No. 1" in this court-martial proceeding and would like to ask you to read Paragraph 3 particularly of that order.

A. (Witness reads as requested).

Q. Colonel Garey, if you wrote that order and an officer came to you and said it was not clear to him, what would you tell him his duties were to be?

A. I would read over the order to him and tell him he was assigned as post commander of the Greenland Base Command.

Q. Would you interpret any other post either than as post commander, Greenland Base Command?

A. It doesn't mention anything other than the post commander, Greenland Base Command.

Q. His duty would be to assume command as post commander of Greenland Base Command?

A. That's what the order says.

* * *

Q. If I should tell you that the Greenland Base Command consists of several posts?

A. He would be post commander of whatever was in the Greenland Base Command if there was more than one. There can be only one base or post commander.

In the prosecution's summation of the case to the court, his statements are quoted:

". . . The whole defense has been that Colonel Wimsatt was not the accused's superior officer and that defense is based upon a very nice interpretation of Paragraph 3, Specification Orders No. 156, introduced in evidence as Prosecution's Exhibit No. 1. The defense would have the court believe that that order meant to say "the" post commander. The prosecution asks the court to believe that that order meant "a" post commander. If that word "a" had been in there, there could have been no question as to the meaning of that order. It is our belief that with the evidence before the court there can indeed be no question as to the meaning of that order. . . ."

If the prosectuion suggested that "a" should be read into the order of June 8 as stated in the above quotation so that the order would read "a post commander," it would seem necessary that the Court proceed then to read into the orders something to indicate which post he was to command, as the evidence shows clearly there were three posts in Greenland. It seems hardly within the realm of justice for a trial court to reconstruct an order and upon that reconstruction render a verdict against the

defendant, particularly when the War Department itself had reconstructed the order under the date of July 8. If the court reached its verdict after such mental processes, thereby creating a nunc-pro-tunc order, it is a far cry from justice as the Committee sees it.

The prosecution stated that Major Denton offered no rebuttal to the "presumption that this command was a lawful command." The whole military machinery is within the reach and command of the Judge Advocate General's Office and if that statement of the prosecution intends to convey that they had rather convict an officer than to summon information from the appropriate departments that might reflect favorably upon an officer, then, indeed, justice by court martial has reached "an all-time low."

The Committee is informed that in ten minutes after the court was closed they had arrived at a verdict of guilty. This is a further indication that it was predetermined that the accused was to be tried by court martial and convicted. The accused was thereafter sentenced to be dismissed from the service; to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for twelve years. It is understood that following a review of this trial record, in accordance with the usual procedure, by the Judge Advocate General, that the sentence of 12 years has been reduced to 5 years, and that the record has been referred to the President for appropriate action.

To be guilty of a violation of the 64th Article of War, it must be shown conclusively that the accused acted "wilfully", or with bad intent. It must also show that there was a lawful command by a superior officer. It is clearly shown in this case that the accused was endeavoring to the best of his ability to carry out what was a War Department

order by direction of the President. The mix-up in that order necessitating an amendment should have been the means of clearing up this whole matter and closing the incident, and that it did not is unanswerable.

Additional evidence adduced at this hearing from Army officers of high standing and experience, speaking both on and off the record, was to the effect that:

Had they been in command in Colonel Wimsatt's place, no such episode as the one involving Major Denton would have taken place. Colonel Wimsatt displayed a very definite persecution complex after returning from his isolation on an ice cap, resulting from an airplane crash a few months previous to the arrival of Major Denton. The general opinion was that he was "ice happy", a colloquialism meaning mentally disturbed. Subsequent to Colonel Wimsatt's return from the ice cap the number of courts martial of men of rank and file for minor offenses became excessive. When Colonel Smith took command after the removal of Colonel Wimsatt, he promptly freed a number of soldiers so persecuted.

It is significant, in the Committee's opinion, that the Army did not find it convenient to grant Major Denton's request to have as his defense counsel Captain John C. Cook, but, on the other hand, it assigned a special officer from the Judge Advocate General's Office in Washington to Mitchel Field to prosecute Major Denton.

Colonel Wimsatt had admitted that the orders were confused and Major Denton did not understand why he was sent to Greenland in the first place since he was a technical inspector of two years' experience.

Conclusion

It is the opinion of the Committee that the evidence adduced at the trial of Major Denton, at the hearing, and as the result of the investigations shows that a serious miscarriage of justice has occurred in the verdict and penalty against him. It is also the firm belief of the Committee that it is unnecessary categorically to enumerate all of the points which contribute to this view as they are fully set forth in the foregoing report. There is, however, one outstanding point which in itself leaves no doubt that an error has been committed, and that is substantiated by the original request for the issuance of orders to Major Denton, for the reasons that the Army Air Forces requested the Adjutant General's Office to assign Major Denton to Greenland as Post Commander, with instructions to assume command upon arrival at his destination; that shortly thereafter, and before the orders had been prepared, Lt. Col. J.H. Dailey, Chief of the Overseas Assignment Section of The Adjutant General's Office, received a telephone message from the Army Air Forces stating that as Major Denton would be ranked by an officer at that particular post, previously designated as being at the point of destination, it would be advisable to have the orders issued "by direction of the President."

The inevitable conclusion from this is that it was a particular post to which it was intended that Major Denton should be assigned; that such post was particularized in two ways; first, by being the one at which an officer outranked Major Denton, and second, by being the post at the point of destination. The logical conclusion is that it was intended by the original request from the Army Air Forces that Major Denton should be assigned to that particular post and no other, and should take command upon his

arrival. This is borne out by the fact that there was no other post at the point of destination and that there was an officer there who ranked Major Denton.

Recommendation

It is the Committee's belief that in the trial of Major Denton there was clearly a miscarriage of justice and the Committee respectfully recommends that the verdict and sentence of the court martial be disapproved by the President and that Major Denton be restored to his former status.

/s/ CARL T. DURHAM
Carl T. Durham
Chairman, Special Committee

/s/ NAME ILLEGIBLE

/s/ NAME ILLEGAIBLE

/s/ c NAME ILLEGIBLE

/s/ A.J. MAY
A.J. May
Chairman, Committee on Military Affairs